

JASON M. ERLICH, Bar No. 203661
Email: jason@erlichlawfirm.com
ERLICH LAW FIRM, P.C.
180 Grand Ave., Suite 1380
Oakland CA 94612
Tel: (510) 390-9140
Fax: (510) 369-3876

Jennie Lee Anderson, Bar No. 203586
Email: jennie@andrusanderson.com
ANDRUS ANDERSON LLP
155 Montgomery Street, Suite 900
San Francisco, CA 94104
Tel: (415) 986-1400
Fax: (415) 986-1474

Attorneys for Lead Plaintiffs and
Proposed Class and Subclasses

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RORESTE REFUERZO and SELINA
CASHIN, on behalf of themselves and others
similarly situated,

Plaintiff,

vs.

SOUTHWEST AIRLINES CO.,

Defendant.

Case No. 3:22-cv-00868-JSC

CLASS ACTION

**FIRST AMENDED COMPLAINT FOR
INJUNCTIVE RELIEF AND DAMAGES**

DEMAND FOR JURY TRIAL

Plaintiffs Roreste Refuerzo (Mr. Refuerzo) and Selina Cashin (Ms. Cashin) (collectively
“Lead Plaintiffs”), on behalf of themselves and those similarly situated, complains against
defendant Southwest Airlines Co. (Defendant or Southwest), demands a trial by jury of all
issues, and alleges:

INTRODUCTION

1
2 1. Southwest, a major international airline, instituted a policy in 2019 that effectively
3 penalizes its flight attendants' exercise of family and medical leave. Under the policy, a flight
4 attendant who would otherwise be entitled to a reduction in disciplinary points is not given the
5 reduction if she took medical or family leave. This policy plainly violates The Family and Medical
6 Leave Act (FMLA) and California state law.

7 2. As a result of Defendant's policy, Mr. Refuerzo was terminated. Lead Plaintiffs
8 bring this class action seeking damages on behalf of other Southwest flight attendants who were
9 terminated by Southwest as a consequence of Defendant's penalization of protected leave. Mr.
10 Refuerzo also brings individual claims to redress his own unlawful termination.

11 3. As a result of Defendant's policy, Ms. Cashin's use of FMLA intermittent leave has
12 caused disciplinary points to remain on her record that, if she had not exercised her protected
13 rights, would have rolled off. Moreover, Southwest's policies have discouraged Ms. Cashin from
14 exercising her right, under the FMLA, to take intermittent leave.

PARTIES

15
16
17 4. Lead Plaintiffs believe and allege Southwest is a major airline and the world's
18 leading low-cost carrier. While Southwest's headquarters is in Dallas, Texas, it has major
19 operations in California, including bases in Oakland and Los Angeles. It also has major operations
20 in San Francisco, San Jose, Sacramento, and San Diego. Southwest is the second largest airline by
21 market share in the San Francisco Bay Area.

22 5. Southwest employs more than 50 people for each working day during each of 20 or
23 more calendar workweeks during the applicable time period; is engaged in commerce or in an
24 industry or activity affecting commerce; and is thus an employer under the FMLA, 29 U.S.C. §
25 2601. Southwest is also an employer as defined by California Government Code § 12945.2 (b) (3),
26 the California Family Rights Act (CFRA).

27 6. Mr. Refuerzo was, at the times when the acts alleged herein occurred, an adult
28 residing in San Mateo County within the State of California. At all times relevant to the complaint,

1 Mr. Refuerzo was employed by Southwest and is an eligible employee as the term is defined by
2 the FMLA, 29 U.S.C. § 2611 (2). Mr. Refuerzo is also an “employee” as that term is defined by
3 California Government Code §12926 (c) and is also an employee employed by an air carrier as
4 defined by Section 12945.2 (r) (1).

5 7. Ms. Cashin is an adult residing in Los Angeles County within the state of California.
6 Earlier in her career with Southwest, Ms. Cashin resided in Clark County, Nevada and Cook
7 County, Illinois. Ms. Cashin is currently employed by Southwest and is an eligible employee as
8 that term is defined by the FMLA, 29 U.S.C. § 2611 (2). Ms. Cashin is also an “employee” is
9 defined by California Government Code §12926 (c) and is also an employee employed by an air
10 carrier as defined by Section 12945.2 (r) (1).

11 12 **JURISDICTION AND VENUE**

13 8. This Court has original jurisdiction over the “First Claim for Relief” under FMLA §
14 105(a)(1), which is memorialized at 29 U.S.C. § 2615 (a) (1) and makes it illegal to restrain or
15 interfere with a worker’s right to family and medical leave established by the statute. Such
16 jurisdiction lies within 28 U.S.C. § 1331.

17 9. This Court has jurisdiction over the “Second Claim for Relief” under section 105(a)
18 of the FMLA, which is memorialized at 29 U.S.C. § 105 (a) and makes it illegal to discharge or
19 discriminate against any employee for exercising their rights under the statute. Such jurisdiction
20 lies within 28 U.S.C. § 1331.

21 10. The remaining Claims for Relief arise under California law and relate to the First
22 and Second Claims for Relief. Together they form part of the same case or controversy under
23 Article III of the United States Constitution, as presented more fully below. Therefore, this Court
24 has jurisdiction over such state claims pursuant to 28 U.S.C. § 1367.

25 11. Venue is proper in this Court as a substantial part of the allegations of unlawful
26 employment practices and the events that gave rise to this action occurred in Alameda County,
27 California and San Mateo County, California.

12. Assignment to the San Francisco Division or Oakland Division of this District is proper pursuant to Local Rule 3-2(c) and (d) because a substantial portion of the events, conduct and omissions giving rise to this action occurred within these divisions of the District.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

13. On January 25, 2022, Mr. Refuerzo filed, prior to initiating this action, a Complaint of Discrimination with the Department of Fair Employment and Housing (DFEH). On January 25, 2022, the DFEH issued a Notice of Case Closure and Right-to-Sue to Mr. Refuerzo, authorizing him to file a private lawsuit against Southwest to enforce his rights under CFRA to full and equal employment opportunities free from unlawful discrimination. Mr. Refuerzo has exhausted all administrative remedies required by the CFRA as a prerequisite to this action.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

14. Southwest assesses “points” for attendance and disciplinary violations. When a flight attendant accumulates 12 points for violating these policies, a committee can approve his or her termination.

15. Southwest has an internal policy entitled “Record Improvement, No Chargeable Offenses in a Quarter.” It provides: “For each calendar Quarter during which a Flight Attendant is active for the entire Quarter and has no chargeable occurrences during the entire Quarter, two (2.0) points will be deducted from the Flight Attendant's accumulated point total until the total reaches zero (0).”

16. Until March 1, 2019, a flight attendant’s leave under the Family and Medical Leave Act or the California Family Rights Act had no impact on the process of penalty point subtraction under the “Record Improvement” policy. That is, taking intermittent FMLA leave did not prevent points from being subtracted if the employee did not accrue any penalty points in a quarter.

17. In February of 2019, Southwest announced changes to its Record Improvement and FMLA policies. Under the new rule, which went into effect on March 1, 2019, a flight attendant’s use of intermittent FMLA leave disqualified the flight attendant from record improvement in a

1 quarter. This policy functions to penalize flight attendants for taking leave protected under the
2 FMLA or CFRA. That is, Southwest attaches a negative consequence to taking protected leave:
3 Employees who exercise the right to intermittent leave lose the benefit of point reductions to which
4 they would otherwise be entitled. Southwest effectively treats the taking of protected FMLA leave
5 as a chargeable offense. Take, for example, an employee who has perfect timeliness and
6 attendance for an entire three-month quarter. Since this employee has no chargeable offenses, she
7 is entitled to a 2-point roll-off of disciplinary points at the end of the quarter. If, however, the
8 employee took 1-day of protected intermittent FMLA leave at any point during those three months,
9 she loses the right to the roll-off.

10 18. In short, the exercise of protected intermittent leave places employees in a materially
11 worse position. For those employees who receive this penalty and who are subsequently
12 terminated, it always plays a role in the termination decision. Given the lockstep and numerical
13 nature of Southwest's disciplinary system, where a flight attendant is fired after reaching 12-
14 points, the nullified roll-off is invariably a clear negative factor in the termination.

15 19. For employees who remain with Southwest, the policy serves as a deterrent to the
16 exercise of the right to intermittent family and medical leave.

17 **MR. REFUERZO'S EXPERIENCE**

18 20. On August 25, 2006, Mr. Refuerzo began working for Southwest as a flight
19 attendant. He was an excellent flight attendant for many years.

20 21. In May of 2019, Mr. Refuerzo applied for intermittent FMLA leave for a chronic
21 knee injury. On June 4, 2019, Southwest approved Mr. Refuerzo's intermittent FMLA leave by a
22 Qualification/Designation Notice. The notice provided that the start date of the approval was May
23 15, 2019, and the end date was May 13, 2020. The frequency of the approved leave was 2 times
24 per year and the duration was 5 days. In November and December of 2019, Mr. Refuerzo used his
25 intermittent FMLA leave pursuant to Southwest's approval.

26 22. In Mr. Refuerzo's final full quarter with Southwest, which comprised October
27 through December of 2019, he accrued no chargeable offenses or penalty points. Under
28 Southwest's record improvement policy, this would typically have entitled Mr. Refuerzo to a 2-

1 point deduction. However, as discussed above, Mr. Refuerzo properly invoked intermittent
2 medical leave pursuant to Southwest's internal rules during the quarter. Under Southwest's
3 alteration of the policy in March of 2019, Mr. Refuerzo did not receive a 2-point deduction.

4 23. As Southwest penalized Mr. Refuerzo for taking intermittent medical leave by
5 barring him from the 2-point deduction to which he would otherwise have been entitled, Mr.
6 Refuerzo ended 2019 with 9.5 disciplinary points instead of 7.5. This difference was determinative
7 of his termination in February of 2020.

8 24. Under Southwest's internal procedures, flight attendants must arrive 1 hour prior to
9 "the scheduled push of the aircraft" and sick calls must be made "at least two (2) hours prior to
10 scheduled check-in of the pairing." If a sick call is not made 2 hours before the scheduled check-in,
11 the flight attendant is assessed 2.5 disciplinary points.

12 25. On January 29, 2020, Mr. Refuerzo lost his voice due to illness. In conformance with
13 Southwest's rules, Mr. Refuerzo called out sick for a scheduled training. On the following day,
14 January 30, 2020, the cold persisted and Mr. Refuerzo remained without his voice. Mr. Refuerzo
15 called in exactly 2 hours before his scheduled check-in to inform Southwest he would not be able
16 to make a flight. Southwest's call logs, as well as Mr. Refuerzo's phone records, show that the call
17 came in exactly 2 hours before the scheduled check-in. However, Southwest incorrectly registered
18 the call 1 hour and 59 minutes before the flight. If the flight had been properly registered, Mr.
19 Refuerzo would not have been assessed any disciplinary points. However, Southwest assessed 2.5
20 points to Mr. Refuerzo for reporting his illness less than 2 hours prior to the scheduled check-in.
21 If Southwest had not penalized him for taking intermittent family leave, the sick call in January
22 2020 would not, in any event, have resulted in Mr. Refuerzo reaching the 12-point termination
23 threshold.

24 26. On February 11, 2020, Southwest issued Mr. Refuerzo a Termination Letter. The
25 letter states that if a flight attendant reaches 12 disciplinary points, a committee can approve his
26 termination. The letter then states: "(a)s a result of your recent Late Sick Call, your attendance
27 points are at termination level. Accordingly, your employment is terminated effective February 13,
28 2020." This is the sole justification Southwest presented for Lead Plaintiff's termination.

1 27. Mr. Refuerzo's termination violated the FMLA, California's Fair Employment and
2 Housing Act (FEHA), and CFRA, as discussed below.

3
4 **MS. CASHIN'S EXPERIENCE**

5 28. Ms. Cashin began working for Southwest as a flight attendant in March of 2015.

6 29. Ms. Cashin suffers from a chronic otitis media, a condition affecting the eardrum
7 and middle ear. Initially, Ms. Cashin feared retaliation for exercising her rights under the FMLA.
8 However, in May of 2018, the persistence of her condition required Ms. Cashin to apply for FMLA
9 leave.

10 30. Southwest rules required that Ms. Cashin finish her FMLA intake before she
11 returned from leave. Ms. Cashin's condition qualified medically for intermittent FMLA leave.
12 Moreover, Ms. Cashin followed Southwest's directive on how to navigate the FMLA application
13 process. However, she could not finish the process until she received an email from Southwest
14 granting her access to Southwest's portal. Southwest did not send the email until less than two
15 hours before her next flight, at which time she had already checked-in for the flight pursuant to
16 Southwest's attendance policy. Accordingly, Southwest assessed Ms. Cashin disciplinary points
17 for the absence instead of characterizing it as FMLA leave.

18 31. As a result of the points assessed by Southwest relating to this incident, Ms. Cashin
19 was terminated effective June 22, 2018. Ms. Cashin grieved her termination through the Transport
20 Workers Union Local 556. On July 23, 2018, before the grievance process was concluded,
21 Southwest reinstated Ms. Cashin to her position as a flight attendant.

22 32. In addition to her ear condition, Ms. Cashin has suffered other health conditions
23 while employed by Southwest: a broken palm, carpal tunnel syndrome, and she recently had
24 deviated septum surgery. When she was out from work with the broken palm, Southwest double -
25 counted her time off as both paid medical leave and FMLA leave.

26 33. In March 2022, Ms. Cashin again applied for intermittent FMLA leave for her
27 chronic otitis media. On or about April 7, 2022, Southwest approved Ms. Cashin's intermittent
28 FMLA allowing two absences per month for 3 days per leave.

34. Southwest will not show flight attendants their disciplinary point status upon request. However, it sends out notifications when flight attendants reach certain point-levels. On May 6, 2022, Southwest informed Ms. Cashin that her point total was 11, 1 shy of the 12-point threshold at which Southwest terminates flight attendants. A quarterly reduction of 2-points would have brought her point totals to a safer level and vouchsafed her a measure of job security. However, any use of FMLA intermittent leave would nullify her access to quarterly reduction. This circumstance is a dramatic illustration of the deterrent force that Southwest's policy wields over thousands of flight attendants who are made to choose between their federally protected rights under the FMLA and the security of their jobs.

CLASS ACTION ALLEGATIONS

A. The Classes

Lead Plaintiffs bring claims on behalf of two major nationwide classes: one for terminated employees and one for current employees. The former seeks monetary damages and the latter seeks injunctive relief. Both nationwide classes contain a subclass made up of California employees.

FMLA Claims Are Brought on Behalf of a Nationwide Class

35. Lead Plaintiffs bring the class action pursuant to FRCP 23(a), as well as subsections

36. (b)(3), and (c)(4) on behalf of a Nationwide Class defined as follows:

All Southwest flight attendants based in the United States since March 1, 2019 to present who exercised their rights to family and medical leave and consequently lost access to a disciplinary points reduction and were subsequently terminated for an accumulation of disciplinary points (hereafter, **the Nationwide Class**).

California Claims Are Brought on Behalf of a California Subclass

37. Lead Plaintiffs bring this action pursuant FRCP 23(a), as well as subsections

23(b)(3), 23(c)(4) and 23(c)(5) on behalf of a subclass of California employees defined as follows:

All Southwest flight attendants based in California since March 1, 2019 to present who exercised their rights to family and medical leave and consequently lost access

to a disciplinary points reduction and were subsequently terminated for an accumulation of disciplinary points (hereafter, the **California Subclass**).

Injunctive Relief is Sought on Behalf of Nationwide and California (b)(2) Classes

38. Alternatively, Lead Plaintiffs brings this action pursuant to Federal Rules of Civil Procedure (FRCP), Rule 23(a), and subsections (b)(2) and (c)(4) on behalf of Nationwide and California Classes defined as follows:

All Southwest flight attendants based in the United States since March 1, 2019 to present who exercised their rights to family and medical leave and consequently lost access to disciplinary points reduction (hereafter, **the (b)(2) Nationwide Class**); and

All Southwest flight attendants based in California since March 1, 2019 to present who exercised their rights to family and medical leave and consequently lost access to disciplinary points reduction (hereafter, **the (b)(2) California Subclass**) (together, **the (b)(2) Classes**).

39. The Members of the (b)(2) Classes, the Nationwide Class, and the California Subclass are referred to collectively as “Class Members” or “The Class.”

40. Lead Plaintiffs bring this action, which may be properly maintained as a class action because there is a well-defined community of interest in the litigation.

41. The Nationwide Class, the California Subclass, and the (b)(2) Classes each meet the requirements of FRCP 23(a) and (c)(4). The Nationwide Class and California Subclass also meet the requirements of FRCP 23(b)(3) and seek damages accordingly.

B. The Classes Satisfy the Necessary Elements of Rule 23

Numerosity (FRCP 23(a)(1))

42. **The Nationwide Class.** Due again to the common need for intermittent family and medical leave and the 16,000 flight attendants subject to the policy, the number of Defendant’s employees who were terminated subsequent to being penalized for taking intermittent leave protected by the FMLA is likely in the hundreds. Accordingly, the Nationwide Class meets the numerosity requirement. Moreover, Class members are readily identified from records maintained

1 by Southwest and may be notified of the pendency of this action by mail or other form of notice
2 customarily used in class actions.

3 43. **The California Subclass.** Southwest has bases in Oakland and Los Angeles.
4 Additionally, it has major operations in San Diego, San Jose, San Francisco, and Sacramento.
5 Southwest has over 2,000 employees based out of Oakland alone. Given this volume, and the other
6 factors discussed above, the total number of flight attendants based in California who were
7 terminated by Southwest following their exercise of rights protected by federal and California law
8 is also likely in the hundreds. Thus, the California Subclass meets the numerosity requirement.

9 44. **The (b)(2) Classes.** The number of flight attendants working for Southwest who
10 took FMLA leave since March 1, 2019 are in the thousands. Southwest employs over 16,000 flight
11 attendants, thousands of whom are based in California, and the need for family and medical leave
12 is common. Thus, the number of members of the (b)(2) Class(es) are likely in the thousands.

13 **Commonality and Predominance (FRCP 23(a)(2) and (b)(3))**

14 45. **The Nationwide Class.** The Nationwide Class Members seek redress for their
15 terminations following Southwest's attachment of a negative consequence to the exercise of
16 intermittent family and medical leave. The First and Second Claims for Relief alleges that the
17 subject March 2019 policy change violated 29 U.S.C. § 2615(a). Thus, the allegation that the
18 policy violated the FMLA forms the common nucleus of each of the Class Members' claims.
19 Answering the question of whether the policy violated the statute will provide a basis for resolving
20 liability for the entire class. This common issue predominates over individual issues, including
21 individual damages calculations in satisfaction of FRCP 23(b)(3). Accordingly, the Class meets the
22 commonality and predominance requirements.

23 46. **The California Subclass.** For the same reasons that the commonality and
24 predominance requirements are met for the Nationwide Class, they are also met for the California
25 Subclass.

26 47. **The (b)(2) Classes.** Southwest's policy change in March of 2019 was a standardized
27 practice that effected all members of the (b)(2) Classes. The sole question for each member of the
28 (b)(2) Classes is whether the policy functions as an impermissible penalty for an individual's

1 exercise of family and medical leave such that the members of the (b)(2) Classes are entitled to an
2 injunction obligating Southwest to discontinue the policy and reinstate points and/or their
3 employment. The answer to this narrow question thus provides a basis for a class-wide resolution
4 and relief. Accordingly, a common question exists and the requirements of FRCP(a)(2) are met.
5 The (b)(2) Classes need not plead nor prove that common issues predominated pursuant to FRCP
6 23(b)(3).

7 **Typicality (FRCP 23(a)(3))**

8 48. **The Nationwide Class.** Following the nullified point reduction, Southwest
9 terminated Mr. Refuerzo. As discussed above, the nullification caused Mr. Refuerzo's termination.
10 If he had not exercised his FMLA rights, Mr. Refuerzo would not have been terminated in
11 February of 2020, as he would have had less than 12 disciplinary points. As Southwest terminates
12 flight attendant's automatically when they reach a 12 disciplinary-point threshold, the termination
13 of each Nationwide Class Member following Southwest's denial of a point reduction was similarly
14 causally related to the use of intermittent leave. Due to the simple math involved, in each case the
15 penalty assessed to the exercise of protected rights was a but-for cause of termination. As Mr.
16 Refuerzo experience exemplifies this dynamic, he meets the typicality requirement for the
17 Nationwide Class.

18 49. **The California Subclass.** The California Subclass's factual allegations are
19 conterminous with the Nationwide Class's factual allegations. The only difference is that the
20 California Subclass, in addition to the FMLA, seeks redress under CFRA in the Third Claim for
21 Relief, and, in the Fourth Claim for Relief, it seeks damages for wrongful termination under
22 California law. As the factual allegations are essentially the same, Mr. Refuerzo meets the
23 typicality requirements for the California Subclass for the same reason that he meets this
24 requirement for the Nationwide Class.

25 50. **The (b)(2) Classes.** Lead Plaintiffs' experience at Southwest illustrates the way in
26 which the subject Southwest policy impermissibly attaches a negative consequence to an
27 individual's exercise of the right to family and medical leave. Southwest nullified point roll-offs to
28 Lead Plaintiffs and all (b)(2) Classes members because of their exercise of protected FMLA rights.

1 As this denial goes to the heart of why the subject policy violates the federal and California law
2 and the injunctive relief sought, Lead Plaintiffs' claims are therefore typical of the (b)(2) Classes'
3 claims.

4
5 **Adequacy of Representation (FRCP 23(a)(4))**

6 51. Lead Plaintiffs have no conflict with the Class, as their claims, like the Class's,
7 depend on a finding that Southwest's policy change in March of 2019 violated the FMLA or
8 CFRA. Moreover, Lead Plaintiffs' counsel is competent and experienced in employment class
9 action litigation.

10
11 **Superiority of Class Action (FRCP 23(b)(3))**

12 52. FRCP 23(b)(3) is satisfied as resolving the predominant and common question – i.e.,
13 whether Southwest's FMLA and discipline reduction policy changes in March of 2019 violated
14 federal and state law – is best resolved on a class-wide basis. Indeed, an answer to this question
15 will resolve whether the Nationwide Class and the California Subclass are entitled to relief.

16 53. Here, the class action mechanism is far superior to other available methods for the
17 fair and efficient adjudication of the claims asserted herein because joinder of all members is
18 impracticable, and the alternative would entail a multiplicity of separate actions potentially
19 numbering in the thousands. Furthermore, because the damages suffered by certain individual
20 members of the Nationwide Class may be relatively small, the expense and burden of individual
21 litigation make it impracticable, if not virtually impossible, for Class members to pursue their
22 claims separately. As a result, the likelihood of individual class members prosecuting separate
23 claims is remote and class action treatment will allow those similarly situated persons to litigate
24 their claims in the manner that is most efficient and economical for the parties and judicial system.
25 It is also anticipated that certain defenses asserted by Southwest will be common to all Class
26 members.

27 //

28 //

Requirements of Rule 23(b)(2)

54. Southwest has acted or refused to act on grounds that apply generally to the (b)(2) Classes, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the (b)(2) Classes as a whole.

55. Southwest has acted on grounds generally applicable to the (b)(2) Classes by adopting and implementing a systemic and unlawful policy, practice, and procedure that penalizes members of the (b)(2) Classes for exercising protected family and medical leave.

56. Southwest's systemic policy of penalizing the (b)(2) Classes' exercise of the right to family and medical leave have made appropriate the requested final injunctive and declaratory relief with respect to the (b)(2) Classes as a whole.

Requirement of Rule 23(c)(4)

57. Class-wide liability and the relief sought herein present common issues capable of class-wide resolution, which would advance the interest of the parties in an efficient manner.

FIRST CLAIM FOR RELIEF

Interference in Violation of the FMLA

(29 U.S.C. § 2515 (a) (1))

Brought by the Nationwide Classes Against Defendant Southwest

58. Lead Plaintiffs incorporate the foregoing paragraphs as if fully restated herein.

59. Lead Plaintiffs First Claim for Relief arises under 29 U.S.C. § 2615 (a)(1), which makes it illegal to restrain or interfere with workers' rights under the FMLA. Southwest's policy, implemented on March 1, 2019, restrained the use of leave under the FMLA by attaching a negative consequence to the exercise of rights guaranteed under the statute. That is, flight attendants taking leave are penalized by losing access to disciplinary point reductions under Southwest's Record Improvement policy. Southwest employees are left to choose between utilizing their leave protected under the FMLA or losing the benefit of a point reduction.

60. When the Nationwide Class Members chose to use their protected leave, Southwest penalized them by barring the Nationwide Class from a disciplinary point reduction under the Record Improvement policy. Subsequently, Southwest terminated the Nationwide Class Members

1 for reaching the 12-point threshold. Each member of the Nationwide Class would not have
 2 reached the threshold at the time of the termination if not for Southwest's attachment of a negative
 3 consequence to the Class's exercise of rights protected by the FMLA. Southwest's interference
 4 with the Nationwide Class's protected right to medical leave was a plain violation of the FMLA.

5 61. Similarly, the (b)(2) Nationwide Class has a right to be free of policies that interfere
 6 with their lawful use of FMLA benefits.

7 62. As a direct and proximate cause of Southwest's FMLA violation, the Nationwide
 8 Class suffered damages as further detailed in the section below entitled "DAMAGES," and the (b)
 9 (2) Nationwide Class is entitled to injunctive relief, including restoration of points, offers of
 10 reinstatement, and/or an order prohibiting Southwest from continuing the unlawful conduct alleged
 11 herein.

12 **SECOND CLAIM FOR RELIEF**
 13 **Discrimination and Retaliation in Violation of the FMLA**
 14 **(29 U.S.C. 2615(a)(1) and (2))**
 15 **Brought by the Nationwide Classes Against Defendant Southwest**

16 63. Lead Plaintiffs incorporate the foregoing paragraphs as if fully restated herein.

17 64. Lead Plaintiffs bring the Second Claim for Relief under 29 U.S.C. § 105(a)(2),
 18 which makes it illegal to discharge or discriminate against any employee for exercising their rights
 19 under the FMLA. Southwest's discrimination and retaliation also violates 29 U.S.C. 2615(a)(1), as
 20 29 CFR § 825 (c) provides that the "prohibition against interference prohibits an employer from
 21 discriminating or retaliating against an employee."

22 65. The policy Southwest implemented on March 1, 2019 discriminated against
 23 Nationwide Class members who used leave under the FMLA by attaching a negative consequence
 24 to the exercise of rights guaranteed by the statute. When the Class members chose to use their
 25 protected leave, Southwest punished them by barring the Nationwide Class from a disciplinary
 26 point reduction under the Record Improvement policy. Subsequently, Southwest retaliated against
 27 the Nationwide Class members by terminating their employment when the members' point-
 28 accumulations reached the 12-point threshold. Each member of the Nationwide Class would not

1 have reached the threshold at the time of their termination if not for Southwest's penalization of
 2 the Nationwide Class's protected FMLA use. Southwest's discrimination and retaliation against
 3 the Nationwide Class for exercising its protected right to medical leave was a plain violation of the
 4 FMLA.

5 66. Similarly, (b)(2) Nationwide Class has a right to be free of policies that impede on or
 6 discourage their lawful use of FMLA benefits.

7 67. As a direct and proximate cause of Southwest's violation of the FMLA, the
 8 Nationwide Class suffered damages as further detailed in the section below entitled "DAMAGES,"
 9 which is incorporated here to the extent pertinent as if set forth in full, and the Nationwide Classes
 10 are entitled to injunctive relief, including restoration of points, offers of reinstatement, and/or an
 11 order prohibiting Southwest from continuing the unlawful conduct alleged herein.

12 **THIRD CLAIM FOR RELIEF**

13 **Discrimination and Retaliation in Violation of CFRA** 14 **(Cal. Gov. Code § 12945.2(1))**

15 **Brought by the California Subclasses Against Defendant Southwest**

16 68. Lead Plaintiffs incorporate the foregoing paragraphs as if fully restated herein.

17 69. Lead Plaintiffs bring the Third Claim for Relief as a class action pursuant to FRCP,
 18 Rule 23, on behalf of the California Subclasses.

19 70. California Government Code § 12945.2(1) makes it an unlawful employment
 20 practice for an "employer to ... discharge ... suspend ... or discriminate against any individual
 21 because of ... an individual's exercise of the right to family and medical leave."

22 71. Southwest discriminated and retaliated against the California Subclasses for taking
 23 medical leave by disqualifying them from receiving a two-point deduction following a quarter with
 24 no chargeable offenses. As a result of the penalty Southwest applied for taking medical leave,
 25 Southwest terminated members of California Subclass when they subsequently reached the 12
 26 disciplinary-point threshold and unfairly withheld points from members of the (b)(2) California
 27 Subclass. Thus, Southwest violated the CFRA by discriminating and retaliating against members
 28 of the California Subclass for exercising their rights to medical leave protected by CFRA.

72. As a direct and proximate cause of Southwest's discrimination and retaliation in violation of Gov. Code § 12945.2(a), the California Subclass suffered damages as further detailed in the section below entitled "DAMAGES," which is incorporated here to the extent pertinent as if set forth in full, and the California Subclasses entitled to injunctive relief.

FOURTH CLAIM FOR RELIEF

**Wrongful Termination in Violation of Public Policy
Brought by the California Subclass Against Defendant Southwest**

73. Lead Plaintiffs incorporate the foregoing paragraphs as if fully restated herein.

74. It is fundamental public policy of the State of California as expressed in Gov. Code §§ 12940 *et seq.*, as well as the common law of this state, that an employer shall not discriminate or retaliate against an individual in any employment decision because of that person's right to or use of medical leave as protected by the CFRA.

75. The California Subclass were fully qualified and competent to perform the essential duties to which they were assigned. Southwest wrongfully and unlawfully terminated each of the members of the California Subclass.

76. As a direct and proximate cause of Southwest's unlawful termination of his employment, Plaintiff suffered damages, as stated below in the section entitled "DAMAGES," which is incorporated here to the extent pertinent as if set forth in full, as well as injunctive relief.

FIFTH CLAIM FOR RELIEF

**Unfair Competition
Brought by the California Subclasses Against Defendant Southwest**

77. Lead Plaintiffs incorporate the foregoing paragraphs as if fully restated herein.

78. California Business and Professions Code §§ 17200 *et seq.* (UCL) prohibits any business from engaging in unfair competition which it defines as any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising including any act prohibited by Business and Professions Code § 17500.

1 79. Southwest's discrimination, interference and retaliation against Nationwide Class
2 Members, the California Subclasses as alleged herein, was an unfair, unlawful and/or fraudulent
3 business practice.

4 80. Through its actions alleged herein, Southwest has engaged in unfair competition
5 within the meaning of section 17200, because Southwest's conduct has violated federal and state
6 employment and labor laws and the California common law as herein described.

7 81. The UCL empowers the Court to enjoin unlawful and unfair conduct.

8 82. As described above, Southwest's policy of penalizing its employees' exercise of
9 protected CFRA and FMLA rights is a plain violation of the CFRA and FMLA, and, therefore,
10 prohibited under the unlawful prong of the UCL.

11 83. Southwest's conduct also violates the fraudulent prong of the UCL in that it failed
12 to adequately disclose aspects of its points system to Class members and the public. Class
13 members could have sought other employment on better terms had Southwest fully informed them
14 of their unlawful practices.

15 84. Southwest's conduct is also unfair under the UCL. The harm to Class members
16 vastly outweighs any benefit to Southwest, and Southwest's conduct is also anticompetitive, as it
17 disadvantages competitors who do follow the law. Moreover, the harm to Class members is
18 precisely what the CFRA and FMLA are designed protect, and therefore tethered to the important
19 legislative policies underlying those statutes.

20 85. The Court should enjoin Southwest's conduct, reinstate points owed to the California
21 Subclasses, and reinstate employment for California Class members who were terminated as a
22 result of the unlawful conduct alleged herein.

23 86. Absent injunctive relief enjoining Southwest from engaging in unlawful, unfair, and
24 fraudulent business practices described above, Lead Plaintiff, members of the California
25 Subclasses, and the general public will be irreparably injured, the extent, nature and amount of
26 such injury being impossible to ascertain.

27 87. Lead Plaintiff and members of the California Subclasses have no plain, speedy and
28 adequate remedy at law.

1 88. For these reasons, Lead Plaintiffs seek appropriate preliminary and permanent
2 injunctive relief.

3
4 **SIXTH CLAIM FOR RELIEF**
5 **Discrimination and Retaliation in Violation of CFRA**
6 **(Cal. Gov. Code § 12945.2(1))**
7 **Brought by Lead Plaintiffs Individually Against Defendant Southwest**

8 89. Lead Plaintiffs incorporate the foregoing paragraphs as if fully restated herein.

9 90. Lead Plaintiffs bring the Sixth Claim for Relief individually.

10 91. California Government Code § 12945.2(1) makes it an unlawful employment
11 practice for an “employer to ... discharge ... suspend ... or discriminate against any individual
12 because of ... an individual’s exercise of the right to family and medical leave.”

13 92. Southwest discriminated and retaliated against Mr. Refuerzo for taking medical
14 leave by disqualifying him from receiving a two-point deduction following a quarter with no
15 chargeable offenses. As a result of the penalty Southwest applied for taking medical leave,
16 Southwest terminated Mr. Refuerzo when he subsequently reached the 12-point threshold. Thus,
17 Southwest violated the CFRA by discriminating and retaliating against Mr. Refuerzo for exercising
18 their rights to medical leave protected by CFRA.

19 93. Southwest discriminated and retaliated against Ms. Cashin for taking medical leave
20 by disqualifying her from receiving a two-point deduction following a quarter with no chargeable
21 offenses. As a result of the penalty Southwest applied for taking medical leave, Southwest
22 continues to keep Ms. Cashin at 11 points, 1 point shy of the 12-point threshold for termination.
23 Thus, Southwest violated the CFRA by discriminating and retaliating against Ms. Cashin for
24 exercising her rights to medical leave protected by CFRA

25 94. As a direct and proximate cause of Southwest’s discrimination and retaliation in
26 violation of Gov. Code § 12945.2(a), Lead Plaintiffs suffered damages as further detailed in the
27 section below entitled “DAMAGES,” which is incorporated here to the extent pertinent as if set
28 forth in full.

///

SEVENTH CLAIM FOR RELIEF
Wrongful Termination in Violation of Public Policy
Brought by Mr. Refuerzo Against Defendant Southwest

95. Mr. Refuerzo incorporates the foregoing paragraphs as if fully restated herein.

96. It is fundamental public policy of the State of California as expressed in Gov. Code §§ 12940 *et seq.*, as well as the common law of this state, that an employer shall not discriminate or retaliate against an individual in any employment decision because of that person's right to or use of medical leave as protected by the CFRA.

97. Mr. Refuerzo was fully qualified and competent to perform the essential duties to which he was assigned. Southwest wrongfully and unlawfully terminated Mr. Refuerzo.

98. As a direct and proximate cause of Southwest's unlawful termination of his employment, Plaintiff suffered damages, as stated below in the section entitled "DAMAGES," which is incorporated here to the extent pertinent as if set forth in full.

DAMAGES

99. 29 U.S.C. § 2617 allow for the recovery of back pay, front pay, injunctive relief, compensatory damages, special damages, general damages, costs, and attorney's fees for an employee who has suffered discrimination, retaliation or discharge in violation of the FMLA. 29 CFR § 8225.220 (b) provides that equitable relief for violations of the statute may include reinstatement. As a result of Southwest's wrongful and unlawful employment practices as set forth in the preceding paragraphs of this complaint, the Class is entitled to offers of reinstatement, as well as the damages permitted by 29 U.S.C. § 2617 and 29 CFR § 825.220.

100. Government Code section 12965 allows for reinstatement, as well as the recovery of back pay, front pay, injunctive relief, compensatory damages, special damages, general damages, costs, and attorney's fees for an employee who has suffered discrimination, retaliation or discharge in violation of sections 12940 *et seq.* As a result of Southwest's wrongful and unlawful employment practices as set forth in the preceding paragraphs of this complaint, the Class is entitled to offers of reinstatement, as well as the damages permitted by law.

1 (e) That Defendants grant Class members' the point reductions to which they were
2 entitled absent the exercise of protected activity;

3 (f) That Defendants reinstate the employment of Mr. Refuerzo and other Class
4 members who were terminated as a result of the unlawful policy;

5 (g) That Class Members be awarded any available prejudgment and post-judgment
6 interest;

7 (h) That Class Members have such other, further, and different relief as the case may
8 require and the Court may deem just and proper under the circumstances.

9
10 **JURY TRIAL DEMAND**

11 Wherefore, Lead Plaintiffs demand trial by jury of all issues, except for attorneys' fees
12 and costs.

13 Date: September 9, 2022

ERLICH LAW FIRM, P.C.

14 /s/ Jason Erlich

15 _____
16 Jason M. Erlich, Esq.